UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS, FORT WORTH EMPLOYEES' RETIREMENT FUND, on behalf of itself and all others similarly situated,

Plaintiffs,

v. 09 CV 3701 (JPO)

JP MORGAN CHASE & CO., J.P. MORGAN MORTGAGE ACQUISITION CORP., J.P. MORGAN SECURITIES, INC., LOUIS SCHIOPPO, JR., CHRISTINE E. COLE, DAVID M. DUZYK, EDWIN F. McMICHAEL,

Defendants.

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New York, N.Y.
December 11, 2012
2:15 p.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

ROBBINS GELLER RUDMAN & DOWD
Attorneys for Plaintiffs
BY: SUSAN G. TAYLOR

SIDLEY AUSTIN
Attorneys for Defendants
BY: ALFRED R. PIETRZAK
DOROTHY J. SPENNER
DAVID L. BREAU

(In open court)

THE DEPUTY CLERK: Your Honor, this is in the matter of Employees' Retirement System of the Government of the Virgin Islands, and Fort Worth Employees' Retirement Fund v. JP Morgan Chase & Co., et al.

Starting with plaintiffs' counsel, can I have all counsel state their appearance for the record please.

MS. TAYLOR: Good afternoon, your Honor.

Susan Taylor from Robbins, Geller, Rudman & Dowd on behalf of the plaintiffs.

THE COURT: Good afternoon.

MS. SPENNER: Good afternoon.

Dorothy Spenner from Sidley Austin on behalf of the defendants.

THE COURT: Good afternoon.

MR. BREAU: David Breau from Sidley Austin for defendants.

MR. PIETRZAK: Robert Pietrzak, Sidley Austin, for defendants.

THE COURT: Good afternoon.

MR. PIETRZAK: Good afternoon, your Honor.

THE COURT: Okay. We're here for a couple of things.

I guess first is plaintiffs' motion for relief under Rule 54(b) and Rule 60(b)(5), given the Second Circuit's decision in, what do we call it, the *Goldman* case? I guess

that's the *Goldman* case.

MS. TAYLOR: That's the shorthand anyway, yes, your Honor.

THE COURT: There's that.

And then there's the related issue of defendants' request for a stay pending Supreme Court review of that same decision.

And then there's also, from some time ago, which I apologize, but I haven't gotten to till now, there were some letters relating to subpoenas.

So we can address all of those in whatever order you like.

Oh, and then there's also the issue of the Section 12 claims, as to which, I guess, the parties seek clarification as to whether they are still in the case, right?

So I guess it would be helpful for me -- the easy part first. If there's no stay of the case, the Second Circuit's decision is the law. And it seems clear to me -- and I think the parties agree -- that it's appropriate for me to grant the motion for relief under the Rules 54(b) and Rule 60(b) to allow the claims that were dismissed basically on review of the law that has now been rejected by the Second Circuit, for those claims to be reinstated. I don't think there's any dispute as to what the claims are. There are claims as to the certificates, to other certificates, basically, beyond those

that the plaintiffs purchased.

Did I say that right?

MS. TAYLOR: That's correct, your Honor.

THE COURT: Okay.

Am I right, Ms. Spenner, that there is agreement on that, putting aside the issue of a stay?

MS. SPENNER: There is agreement that the claims that had not been previously dismissed can be reinstated as to the ten offerings, but I just want to be careful and exclude sort of the Section 12-type issue.

THE COURT: All right. Yes.

Let's talk about the stay.

Defendants argue that the Second Circuit's decision is an outlier and they disagree with it. And they think there's a good chance that the Supreme Court will grant cert. And I did look at the surpetition. It's a good surpetition; it's a very good Supreme Court advocate on a surpetition.

I still think with anyone -- being a student of the Supreme Court, making predictions as to any single case that's going to be granted by the Supreme Court at any given time is a hard thing. And any one case, even when there's an arguable split between circuits, the odds -- maybe I thought the odds were one percent before I looked at the surpetition. Having read the *Nomura* decision by the First Circuit and the surpetition, maybe it's higher than one percent; maybe it's

ten. I don't know. But it's still below 50, because any given case, there are all sorts of reasons involving further percolation. The split is not a self-conscious split; it's not one circuit saying we disagree with another circuit. There are lots of reasons they might not grant this case. And if they are not going to grant this case, we should just -- the Second Circuit has said what it's said, and we should proceed.

So I guess I'll ask, Ms. Spenner, if you want to address that. And also if you can give me any information on the timing of the Supreme Court's review, if you know of any.

MS. SPENNER: Sure.

So as I understand it, the Supreme Court has asked for an opposition. No opposition was filed. The Supreme Court has asked for an opposition. I believe that is due some time in late January or mid January. And it's supposed to be discussed at the February 15th conference.

So I think, you know, within the next couple of months we will all have clarity on whether the Supreme Court is going to take up the issue. Obviously arguments can be made about the significance that they are asking for an opposition.

I think your Honor had already denied the stay request, but I think I would reiterate that with leave for us to review it if the Supreme Court takes up the decision. And we'll see what happens obviously, but I expect we may very well be back given what's transpired.

And I would just reiterate that given the scope issues in this case, this is actually the rare circumstance where a stay could very well be warranted, because the entire framework and scope of this case with respect to discovery, with respect to class certification, with respect to the myriad of third-party subpoenas that have already gone out that we now have to address even today partially before your Honor, all of that work it makes sense to do at one time for the full scope of offerings that are at issue in the case. And so certainly if the Supreme Court takes up the decision, we think a stay is absolutely warranted.

THE COURT: Let me ask you about efficiency.

I guess one thought I had is -- first and foremost, I think I can assume the Second Circuit -- they grade my papers and I follow what they say. So I don't generally assume in any given case that a decision by the Second Circuit is going to be reversed or questioned by the Supreme Court. It's always possible. And if that happens, obviously we'll address it when we need to.

But in terms of efficiency, would there be some sort of rational -- there obviously has been -- I think there's been no significant discovery in the case other than maybe some third-party subpoenas. Is there a way to start discovery with respect to the subset of claims that aren't affected by the Second Circuit's decision; that is, those claims as to the one

certificate that was purchased.

MS. SPENNER: I think certainly it makes sense and could very well make sense here to only do discovery as to the one offering first. And in terms of document discovery, that can be sort of severed off. Even the third-party subpoenas that we'll talk about were only because only one offering was in the case, were only issued as to one offering. Defendants could do their document production. And we have indicated to plaintiff that we expect our first production as of the stay, obviously, to go out the next week. We can conduct our discovery, our custodians, our search terms as to just the one offering first. And that will cut out a significant amount of work in the event that the other ten don't end up in the case.

Where sort of it becomes difficult if things go on for too long is that it doesn't make sense to do class certification briefing, for example, on just one offering if ten will end up coming back into the case, or depositions, for that matter, where we suspect there will be significant overlap of custodians and people who will be deposed.

But it is possible, and we would certainly advocate for until we figure out what the Supreme Court is going to do with the situation, which has great impact here obviously, to only conduct discovery as to -- document discovery as to the one offering; sort of put off the rest. Again, we're talking in two months we'll know whether a further stay actually makes

sense to discuss or whether it's just an interim situation.

I will note also -- and I think we attached this to our brief -- obviously we agreed that your Honor has to follow what the Second Circuit has said at this point.

Judge Kaplan, in the *IndyMac* case, when faced with a similar motion for relief, declined to rule on it for some time and was waiting to see what the Supreme Court did until he finished the ruling.

At that point, at the point when it first happened, we didn't think there was a dispute here; but now there's clearly a great dispute as to the Section 12 issues.

THE COURT: So he's not applying -- there was a similar motion to amend.

MS. SPENNER: There was.

And this was great disagreement between the parties as to which offerings. Because of the nature in which the originators overlapped or didn't in those set of deals, there was a lot of, you know, paperwork and discussion among the parties as to how the NECA should be applied, how the *Goldman* case should be applied in that situation.

And Judge Kaplan did deny a request for a stay, but simultaneously, in a sense, stayed the motion by saying I'm going to wait to see what the Supreme Court does until I rule on a motion for relief.

So that is certainly an option that your Honor could

take since now there is a great disagreement in this case as to Section 12, which would have the effect, of course, of discovery only proceeding as to one offering.

THE COURT: Right.

And I guess I'm just trying to think. I hesitate to ignore the Second Circuit, which has issued its decision, but I guess the theory of doing that is if it happens that the Supreme Court grants cert. and reverses or modifies the principles in the case, then you had to amend twice, I guess. Then you've amended once or you've allowed claims, and then you have to go back and undo it.

MS. SPENNER: Right.

And I think Judge Kaplan framed it he denied the motion without prejudice to renewal, similar to what your Honor did on the stay, without prejudice to renewal after the Supreme Court acts on the writ for certiorari and, if the writ is granted, decides the case, just to alleviate the sort of starting and stopping, which unfortunately all of us have had to endure in this case.

THE COURT: Right.

I'll hear from plaintiffs' counsel.

MS. TAYLOR: If I may, particularly on that point, there's another court and another decision that's gone entirely the opposite way, another case actually against J.P. Morgan, some of these same defendants that these counsel represent.

In a very similar case, the Court has added all of the Section 11 claims back in for those offerings which had been previously dismissed. And that case is progressing following the Second Circuit *Goldman* decision, the reasoning in that case.

THE COURT: And is that in this Court?

MS. TAYLOR: That's in the Southern District of New York.

THE COURT: Which judge has that?

MS. SPENNER: Is this the plumbers and pipefitters?

MS. TAYLOR: Yes.

MS. SPENNER: It's the Eastern District of New York. It's Judge Korman.

THE COURT: Okay. Oh, that's right.

MS. SPENNER: There's a bit of a wrinkle. He took it upon himself without a new motion to add the offerings back in; but then the parties had a dispute as to whether he had gotten the offerings right.

He asked for the parties to write to the Court to clarify that; we did. We've now agreed which offerings would be affected. But the judge has not yet amended his order.

And, in fact, we've moved to stay that case pending the Supreme Court's review. And he's not ruled on the stay motion either.

So, yes, we do have a scheduling order in place, but

it's really unclear what the impact will be in that case.

THE COURT: Okay.

MS. TAYLOR: And with respect to the stay, as I think we point out in our papers and as your Honor has already discussed, obviously we think it's quite speculative whether or not the Supreme Court is even going to take it. And given the nature of the kind of discovery in this case, it will be broader in the sense that there will be additional claims, but the exact same types of documents being requested from the same third parties, primarily dealing with the same individuals who were working on these particular offerings, using the same types of search terms, sort of the broad view of discovery is going to be the same as far as what we're asking and what these third parties and defendants are going to have to search for, whether it's one claim or all of the claims.

THE COURT: But given that the Supreme Court may change the state of things, doesn't it make sense to have a period of discovery that is limited to the one offering for the next few months at least?

MS. TAYLOR: I mean yes, that does make some sense. And, frankly, I think that's sort of what the parties have been pursuing anyway pending this Court's decision on which claims will be entering. As far as whether it's a matter of months, I don't know that it will make that much difference as far as the work that the parties are going to do. I suspect that even if

you said just proceed on the current one offering that we have, I don't know that we would actually receive much in the way of a document production from any of the third parties or defendants within a couple of months to make that much of a difference as far as their burden is concerned.

But, yes, certainly that is a way to proceed.

THE COURT: I'm going to grant the motion for relief. I don't know the docket number of it, but the motion for relief filed by plaintiffs from the Court's May 9th, 2011 order under both Rule 54(b) and 60(b)(5), because I find that the Second Circuit's decision is a change in the law as argued by plaintiffs that warrants revisiting that prior decision by Judge Koeltl in this case.

I'm obviously aware of the Second Circuit; I read the surpetition. And the fact that they called for a response doesn't mean nearly as much as the call for the views of the solicitor general would mean, but it means something. So I want the parties to obviously keep you posted on what the Supreme Court does.

And in the event that the Court either calls for the views of the solicitor general or grants cert., please notify me right away, and I'll reconsider a stay of either a stay of the case or a stay of a portion of the case, for example, a stay of discovery other than as to the one offering.

So on that motion, I would like -- I guess I'll ask

plaintiff to give me a proposed order for the exact language after conferring with the defendants. I assume you all can agree on the scope of the order, other than the 12(a)(2) issue, which I'm about to address. Other than that, you all can agree, right?

MS. TAYLOR: Yes.

MS. SPENNER: I think so.

THE COURT: I'll tell you where I am on the 12(a)(2) issue. I don't think it's in the case; I think it's gone. I think Judge Koeltl ruled on alternative grounds. And when I allow the substitution of the new lead plaintiff, I considered issues of prejudice. And there was, I think, really reliance on my part and on the defendants' part on the notion that the case wouldn't change, that the claims in the case wouldn't change. And that was part of what I was basing my decision on in allowing substitution of the lead plaintiff.

So my inclination is that those claims -- the dismissal with prejudice of those claims remains law of the case.

If you want to make a record of anything other than what you've said in your papers, you may.

MS. TAYLOR: I'll be very brief, your Honor.

THE COURT: Sure.

MS. TAYLOR: Thank you.

I think plaintiffs' view is at the time that Judge

Koeltl dismissed the Section 12 two claims, he was primarily focused on the fact that the lead plaintiffs at the time didn't have Section 12 two standing. And sort of his view of those claims stemmed and flowed from that fact.

And our position is that fact changed with the introduction of the new lead plaintiffs, that they do, in fact, have Section 12 standing.

And then in conjunction with the *Goldman* decision that allows plaintiffs to bring claims for others and reinstated the Section 11, Section 12, and Section 15 claims when they remanded the decision, that it would make sense that these plaintiffs could pursue those claims going forward.

We don't think that there has been any prejudice to defendants in that they've been on notice of these claims since the inception of the case. There has been no judgment on the Section 12 claims.

The sort of practical matter of going forward, whether it's Section 11 or Section 12 or both doesn't really change the scope of the case as far as the work that needs to be done. The claims are very similar, almost identical as far as what the plaintiffs are going to need to prove, the type of discovery we will have to have. That will not change as a result of the Section 12 claims being included in the case. It's an issue of damages, which obviously would be dealt with at a later time.

THE COURT: Ms. Spenner, would you like to address the issue?

MS. SPENNER: Sure. I will briefly.

As your Honor noted, the law of the case doctrine means that you have to adhere to the prior rulings, unless there's a change in controlling law or new evidence for the need to correct clear error. And we think there's none of that here.

Judge Koeltl, as you know, dismissed the Section 12 claims for two reasons: That USVI versus the prior lead plaintiff didn't allege that it purchased certificates in the IPO, which is a requirement under Section 12. And that even if an aftermarket purchaser would have had standing, the second amended complaint's allegation as to whether the defendants that were sued on that claim were appropriate statutory sellers was too conclusory to be supported, and so nothing really changes that result here. Certainly the NECA does not -- the *Goldman* decision does not speak in any way, shape, or form as to those issues.

And essentially, if we go back now and act as if Judge Koeltl's ruling doesn't exist for the reasons that he held, we're essentially gutting the pleading requirements of Section 12, and we're gutting the individual standing requirements. And as your Honor has already noted, it is notable that when they sought a substitution, and even now they claim they don't

need to amend the complaint, no amendment is necessary.

So under the facts and circumstances here, there would be great prejudice to defendants if these claims are suddenly allowed back in the case. And it would completely be in conflict of the law of the case doctrine.

And, in fact, as we stated in our papers, the brief discussion of Section 12, albeit in a different context and not on all fours, shows that the *Goldman* court is citing the *Morgan Stanley* decision and the same decisions on which Judge Koeltl relied in dismissing the Section 12 claims here in noting that the Section 12 claims in the *Goldman* case were dropped by the plaintiffs in that case. So we just think there's no new facts, there's no new evidence, there's no error in what Judge Koeltl held.

And plaintiffs should be stuck with their representation to defendants and to the Court that they wanted no amendment; that the case remains as it was; that they were simply looking to stand and choose a prior lead plaintiff, and those shoes contained no Section 12 claims, which were dismissed with prejudice, which is a critical component of this.

The other two things I would point out is their claim that defendants won't be prejudiced, because there's just damages. Section 11 and 12 are not identical; that's why, for example, Judge Koeltl ruled one way on certain Section 11

claims and an entirely different way on Section 12.

Obviously the entire scope of the case is greatly affected if the Section 12 claims are allowed back in. So that's a critical prejudice to defendants at this point, who have relied on plaintiffs' representation for over a year now.

I think that's all I have.

THE COURT: I agree with defendants on the point, and so I'm going to -- insofar as clarification is required, I'm going to just clarify that any relief granted based on the *NECA v. Goldman* case does not extend to reinstatement of the 12(a)(2) claims. And those 12(a)(2) claims, based on law of the case and also the overall history of this case, including substitution of the lead plaintiff, require me to reject the request -- either by motion for relief or some other form -- to reinstate those 12(a)(2) claims which were previously dismissed with prejudice by Judge Koeltl and remain dismissed with prejudice.

So based on that, I assume you all can agree on a proposed order with respect to the motion for relief. And I'll hear from you when there's any news from the Supreme Court about the surpetition.

And then the only other issue were these letters from actually some time ago relating to third-party subpoenas.

Are you all prepared to talk about that, as well, or not?

MS. TAYLOR: I don't have those letters with me; I didn't know that was going to be part. But certainly I can, to the best of my ability, recall exactly whatever it is your Honor would like to discuss.

THE COURT: I guess on behalf of the lead plaintiffs, counsel for lead plaintiffs has written challenging 58 subpoenas that defendants had served on absent class members I guess a couple of months ago. And they argued that some of them violate the rules on their face because of they call for production in New York, but they are more than 100 miles; they go to someone more than 100 miles away.

And defendant has argued, among other things, that plaintiffs don't have standing to object to the subpoenas; that some of the individuals have complied voluntarily; that they are recipients of the subpoenas.

In any event, the law doesn't at least clearly or categorically preclude -- as a matter of class action, discovery law does not preclude the validity of subpoenas served on absent class members. And I'm inclined to agree that they are not categorically precluded, that they are not necessarily inappropriate, and, in any event, it's not clear to me that lead plaintiffs have standing to object to the subpoenas. So I think they're fine.

Has there been anymore action on this front?

MS. SPENNER: No. In light of the letters to your

Honor, we had sent letters to the third parties saying you don't need to produce anything if you haven't already, to those that were outstanding. And then obviously with the *Goldman* decision back and forth, we've sort of held off to see what the scope of the case is.

What we can now -- assuming that's your Honor's ruling, we can now provide those subpoenas. And I would imagine we'll need to issue additional similar subpoenas with respect to the remaining ten offerings. And at this point, even amend those subpoenas to include all offerings.

MS. TAYLOR: Just one point on that, your Honor.

THE COURT: Yes.

MS. TAYLOR: To the extent during sort of our meet-and-confer, and even while submitting the letters to the Court, one of lead plaintiffs' concerns was sort of the breadth of the language in the subpoenas. I understand your Honor is saying you don't believe that lead plaintiffs have standing to object to those. Defendants had mentioned that they were specifically just looking for transactional information. But our concern, and the concern of some of the other case law that's gone before, saying that absent class member discovery isn't necessarily proper is when you're sort of getting into a situation where you're seeking information about claims and defenses of absent class members sort of in the notion of putting them in a position of having to respond as parties when

they're really absent class members and relying on the lead plaintiffs to engage in the discovery process.

So just we want to, I guess, continue to lodge our objection to the extent that those subpoenas or others like them continue to go out seeking further information and transactional documents from those types of absent class members.

THE COURT: Ms. Spenner, do you want to address that?

MS. SPENNER: Sure.

I mean, well, certainly as to these subpoenas, these are limited, and much more limited; they only sought trading information, which can't be had from lead plaintiffs.

THE COURT: And J.P. Morgan doesn't have the information itself? That was one of their arguments, I thought.

MS. SPENNER: Not necessarily. There could be other pricing information that could conflict with information J.P. Morgan has. Not necessarily.

And there's certainly information out in the market about other purchases that were conducted through J.P. Morgan that impact all sorts of class certification and other pricing and damages issues.

So as to these subpoenas, we think that's sort of a not really appropriate objection at this time. I will note though that there are going to be many issues in this case

about plaintiffs' knowledge, knowledge of people in the class and absent class members. And so we obviously haven't issued subpoenas geared towards that kind of information yet, and we're still considering when and how we may do so. But it's probably no surprise to anyone that we will all need to confront that issue at some point in time.

THE COURT: Yes.

I'm going to deny the motion to quash. I don't even know if it's actually filed as a motion, it may be just a premotion letter, but I'll deny it anyway, but without prejudice to motions based on breadth in the future, based on -- I mean given what I saw and the way defendants have represented the breadth of the subpoenas, I didn't think these were too broad. However, going forward, this is without prejudice to arguments in the future about the breadth of subpoenas and whether there may be a proper motion to quash in the future.

I also will probably be referring this to the magistrate judge for discovery purposes because it just seems like there's going to be -- especially if the Supreme Court denies cert., there's going to be a high volume of discovery in the case, and those magistrate judges are very good at that stuff. So I'll probably be referring this to the magistrate judge.

I can't remember whether there's currently a case

management plan that has -- I assume we need to set new deadlines for discovery.

Is there currently a deadline in place or no?

MS. TAYLOR: There is, your Honor. We had only addressed sort of redoing the schedule with respect to class certification. We had made a previous motion to your Honor with respect to the larger schedule that just the class certification piece sort of be taken out. But, yes, considering the time that's elapsed and the potential change in the claims, we will need to do a new case scheduling order.

THE COURT: You know what I might do is I might just for now, I might schedule something shortly after we think the Supreme Court will rule, and then just revisit where things stand. Between now and then, I'm just going to have you limit discovery to the one offering that will be at issue in any event.

MS. SPENNER: And I think it was up for discussion at a February 15th conference.

THE COURT: Okay. So February 15th.

MS. SPENNER: So maybe late February.

THE COURT: So late February. So it will be the following week that they'll know?

THE LAW CLERK: Usually announced either Friday at 2 p.m. or Monday at 9:30 a.m.

THE COURT: My law clerk is the Supreme Court expert.

MS. SPENNER: I was thinking you knew better than us when the timing would be.

THE COURT: He knows better than anybody.

MS. SPENNER: Sometimes they put it off, if you waited until late February or early March.

THE COURT: We can have a conference the last week of February, if that's okay. The week of February 25th.

MS. SPENNER: I think that works.

THE COURT: Ms. Taylor, does that work for you?

MS. TAYLOR: Yes, your Honor, I think so.

MS. SPENNER: I know I have a vacation around that, but I don't have the dates in front of me.

THE COURT: Do you want to do it the week before or after?

MS. SPENNER: The week after would certainly work. If we go too far before, we might not know anything, so -- or the first week of March.

THE COURT: We can do the first week. I think the week of March 4th we're pretty open, right?

Can we do March 4th at 10 a.m.?

MS. TAYLOR: Yes.

MS. SPENNER: That's fine.

THE COURT: Monday, March 4th. Okay.

And then at that point we'll hopefully know more, and then we'll go from there.

Oh, you already gave me a proposed order.

MS. TAYLOR: Yes, yes, we had, your Honor. I just didn't know if you wanted us to add some additional language, which we're happy to do.

MS. SPENNER: Judge Koeltl dismissed some other claims with prejudice, some aspects of Section 11 claims and Section 15 claims.

THE COURT: Right. No, I know.

MS. SPENNER: So we may need to -- I'm not sure what was handed to you.

THE COURT: I actually misstated something in my ruling on substitution as to Section 15 claims. I think I said they were dismissed, when, in fact, they were not dismissed as to the individual defendants.

MS. SPENNER: Right.

THE COURT: But I think his opinion is pretty clear about what's in and what's out.

MS. SPENNER: Absolutely.

THE COURT: But if you'd like to have it clarified in the proposed order -- the important thing to be clarified is what I said about Rule 12(a)(2) claims.

MS. SPENNER: Exactly.

THE COURT: Why don't you give me another proposed order after conferring. I think everyone will be in agreement on what's in and what's out.

MS. SPENNER: Great.

THE COURT: Okay?

And we'll see you all back here March 4th at 10 a.m.

MS. SPENNER: Thank you, your Honor.

THE COURT: Anything else for today?

MS. TAYLOR: Not from the plaintiffs.

THE COURT: Okay. Thanks a lot.

MS. TAYLOR: Thank you.

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